

F. M. S. REPORTS.

[ORIGINAL CIVIL JURISDICTION]

HOWES, J.

July 17, 1940.

YEE KONG AS ADMINISTRATOR OF THE ESTATE OF WONG LIAN, DECEASED

(Plaintiff)

vs.

TEH SENG

(Defendant).

[IPOH ORIGINATING SUMMONS No. 209 of 1939]

Negligence—Civil Law Enactment No. 3 of 1937—Claim by personal representatives of deceased for damages for deprivation of expectation of life—Executors (Powers) and Fatal Accident Enactment (Cap. 19)—Assessment of Damages.

The deceased woman was killed, as was alleged, through the negligence of the defendant's driver while driving a lorry on the morning of the 6th May 1939. The plaintiff, as administrator, claims to recover damages under the Civil Law Enactment No. 3 of 1937 for (1) damages for a cause of action which had vested in the woman while alive, and survived for the benefit of her estate, namely that she was deprived of her expectation of life (2) funeral expenses in burying the deceased. The plaintiff also sues to recover damages for himself and his two infant sons as dependents under the Executors (Powers) and Fatal Accidents Enactment (Cap. 19).

Held, that (1) The death of the deceased was caused by the negligence of the defendant's driver

(2) Damages could be recovered by the plaintiff, as administrator, for the cause of action arising out of the loss of expectation of life sustained by the deceased

(3) In assessing the damages thus awarded under the Civil Law Enactment No. 3 of 1937, account must be taken of any damages already awarded under the Executors (Powers) and Fatal Accidents Enactment (Cap. 19).

Cases referred to:—

- (1) *Rose v. Ford* 1937 A.C. 826.
- (2) *Trubyfeld v. Great Western Railway Co.* 1937 4 A.E.R. 614.
- (3) *Morgan v. Scoulding* 1938 1 K.B. 786.
- (4) *Feay v. Barnwell* 1938 1 A.E.R. 31.

The facts and arguments appear sufficiently from the judgment below.

K. Mac Duff for the Plaintiff.

B. E. Ross and K. C. Chan for the Defendant.

Cur. Adv. Vult.

Howes, J.—In this suit the Plaintiff, as Administrator of the deceased woman Wong Lian, claims under the Civil Law Enactment No. 3 of 1937 for:—

- (1) Damages, for a cause of action which had vested in the woman while alive, and survived for the benefit of her estate, namely that she was deprived of her expectation of life.
- (2) The sum of \$70.00 said to have been expended by him as funeral expenses, in burying the deceased.

The Plaintiff also sues to recover damages for himself and his two infant sons (aged respectively four and two years) as dependents, under the Executors (Powers) and Fatal Accidents Enactment (Cap. 19).

Both claims are based on the negligence of the Defendant's driver, who, while driving his lorry at about 5.15 a.m. on the morning of the 6th May 1939 when it was still dark, ran into and killed the deceased, practically instantaneously.

The principal witness for the Plaintiff was Chan See, a woman mining cooly who was walking with the deceased (who was also a mining cooly) on a straight length of tarred road, in the direction of Telok Anson.

The road was 18' 6" wide, and on each side was a grass verge 10' 4" wide, behind which were some banana trees on both sides.

I accept Chan See's statement that both she and the deceased were walking on their left-hand side of the road. She said they were both walking on the grass verge, but this (since there were no marks of the lorry having gone on the grass) I do not accept.

According to this witness, the lorry "came to me suddenly," and collided with her, knocking her down; "the deceased also fell after being struck by the lorry."

This witness explained that she and the deceased had been walking on the left-hand side of the road, ever since they left their neighbouring houses that morning, and never had any occasion to, and did not cross the tarred road that morning. I accept this statement as true.

From the medical evidence, it is clear that the wheels of the lorry must have passed right over the deceased's pelvis, causing instantaneous death. The lorry was coming from the direction of Telok Anson, and was facing Chan See and the deceased.

Neither the Defendant nor his driver gave evidence. The Plaintiff's advocate had put in evidence the driver's and his passenger's statement made to the Police later on the day of the accident. Their statement was to the effect that at the point where the accident took place is a path, leading to the bananas

and to the squatters' houses behind, and according to the driver, when the lorry reached this point he saw "three Chinese women darting across the road towards my right-hand side of the road. This happened so suddenly that to avoid them I had to swerve to my right, and though I turned the steering of the lorry a good deal, I failed to avoid the three women completely. I think I knocked down the first of the three women and also knocked slightly the second of the three."

The Defendant's advocate relied on this statement to prove that the driver was not negligent; and further in his statement of defence pleaded that the deceased or some third person unknown was guilty of contributory negligence, and that the accident was inevitable.

Since this story is in direct contradiction of Chan See's evidence that she and the deceased never crossed the road, and owing to neither the driver nor the passenger having given evidence, so that I could test the veracity of their statements, I am unable to accept their version of what took place. It seems to me highly improbable that three women would be "darting across the road" at that time of morning. Even if they did so, there was the 10' 4" grass verge which they had to cross before reaching the tarred road; and if the driver had been paying attention to his driving he would have seen them in time to stop his lorry, or to have applied his brakes. There was no evidence of any brake-tracks on the surface of the road.

In view of this, I am satisfied that the death of the deceased was caused by the negligence of the Defendant's driver.

That being so, I will deal, firstly, with the Plaintiff's claim for damages under the Fatal Accidents Enactment, and the first question is to decide what pecuniary loss, the Plaintiff and his sons have suffered. "Pecuniary loss" means some substantial detriment from a worldly point of view.

The deceased was a mining cooly working on a dredge, and at the date of her death had been so employed by a contractor on a temporary job for 2 or 3 months before her death. She earned \$16 or \$17 a month. The Plaintiff was similarly employed and earned about \$15 a month. Both had come to this country 3 years ago, and the Plaintiff says the deceased worked continuously since then, except when the two babies were born. They lived with the Plaintiff's brother during this time, and while the deceased was working at the dredge, the brother's wife looked

after the children. The deceased used her earnings to support the children. She was 25 years old when killed, and the Plaintiff said "If she had not died I should have expected her to work till she was 60."

The medical evidence was that the expectation of life of a woman mining cooly is 50 years; but in this particular case, in view of her enlarged spleen, (due probably to chronic malaria) the Doctor thought the deceased "had about 20 years in front of her."

It is extremely difficult to assess damages, or to proportion them in a case like this. The deceased was under no legal obligation to assist the Plaintiff, or to contribute towards the household expenses. Nor was it her duty to maintain the children. She could have spent her earnings entirely on herself, for instance in the purchase of jewellery or clothing. Her employment was precarious, and accompanied by a certain amount of risk.

The Plaintiff as the husband is supposed to be the bread-winner. He is a young man of 27, and expresses his desire to marry again when he can get work and money. When he marries, his new wife will, doubtless, work and contribute to the household expenses.

The amount of damages has to be calculated in reference to the reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuation of the life of the deceased.

The two sons will, presumably, be getting work in 11 and 13 years time respectively, viz: in an average of 12 years time, out of their mother's expectation of life; so that they would only expect to receive the present pecuniary benefit for another 8 years.

Supposing, out of the deceased's earnings, the two boys had benefited to the extent of \$2 a month each, this would be \$48 a year for the two, or a total of \$384 for the 8 years.

Assuming the Plaintiff benefited \$2 a month from deceased's wages (after deducting her cost of living, clothing &c); this, during her 20 years expectation, would amount to a total figure of \$480.

Against both these figures must be set off the probability of unemployment, illness, disinclination to contribute &c., on the part of the deceased, all of which are purely speculative. It is most unlikely that the deceased would work continuously, and possibly a fair deduction would be about 25% from the above figure.

I assess the damages under the Fatal Accidents Enactment at \$650 to be divided between the Plaintiff and his 2 infant sons in the proportion of \$360 to the Plaintiff and the balance between the two sons equally viz., \$145 each.

I now deal with the assessment of damages claimed under the Civil Law Enactment No. 3/37.

Firstly, the claim for \$70 funeral expenses. The Plaintiff gave no evidence as to this, except of the fact that he "took the body to the burial ground at Bidor."

In the absence of such evidence I consider that the sum of \$50.00 should be sufficient for the funeral of a mining cooly. In respect of this claim, I therefore award the plaintiff \$50.00.

I now approach the claim for damages by reason of the deceased being deprived of her expectation of life, which, until the passing of Enactment 3/1937 could not be recovered by a deceased person's personal representative. The relevant sections of this Enactment have been taken from the English "Law Reform (Miscellaneous Provisions) Act 1934," an Act on which the Lord Chief Justice of England, Lord Hewart, has commented on the incomprehensibility of its statutory provisions and the difficulty of applying them! However, since the legislature has introduced this law into these States, I must endeavour to do the almost impossible; namely, to form an estimate in terms of dollars of the value of human life, either to a person himself, or to others connected with him.

It is established that a living person can claim damages for loss of expectation of life, and now since the passing of the above Enactment, the moment before the deceased woman died, there was, apart from her actual death a few seconds later, a cause of action vested in her for deprivation or loss of expectation of life. Before the Enactment, that cause of action would have ceased with her death. That same cause of action, by force of the Enactment, now survives in the administrator.

To quote Lord Atkin in *Rose v. Ford*⁽¹⁾ (1937) A.C. at p. 834 "There seems to me to be a substantial distinction between damages awarded to the living, because life is shortened, and damages to a third person, because of some other person's death."

Had the deceased been alive now, and making this claim on her own account, it would not be so difficult to assess the damages.

I have no evidence as to her life, except that she was a mining-cooly, working most of the day, so that

she was obliged to leave her children to the care of her husband's sister-in-law. Her occupation was, to a certain extent, of a dangerous nature: she might have died of subsequent childbirths.

The calculation cannot be based on loss of earning capacity, and one is not allowed to base it upon the social position of the person whose life is shortened (per Greaves-Lord, J. in *Trubyfield v. Great Western Railway Co.*⁽²⁾). The fact that the death was instantaneous, as in the present case, was held by Lewis J., in *Morgan v. Scoulding*⁽³⁾ to be no bar to a claim for damages for shortened expectation of life.

In the present case, I must take into account the fact that I have awarded the Plaintiff damages under the Fatal Accidents Enactment, and that the persons who benefit under that Enactment also benefit personally under the intestacy of the deceased, under the 1937 Enactment, and consequently the damages awarded under the Fatal Accidents Enactment must be taken into consideration, (*Feay v. Barnwell*⁽⁴⁾).

It is impossible to arrive at even an approximate figure for the damages suffered by reason of the deceased's shortened expectation of life. A Jury might be able to do so, by striking an average amongst themselves.

In my opinion, \$1,000 would be a reasonable amount in the present circumstances, and I award this sum in addition to the claim for funeral expenses, less the amount previously awarded.

I therefore give judgment for the Plaintiff under Civil Law Enactment for \$400, in addition to the sum of \$650.00 already awarded under the Fatal Accidents Enactment, with costs.

Judgment for the plaintiff.

[ORIGINAL CIVIL JURISDICTION]

HOWES, J.

October 18, 1940.

VALAUTHA ASSARI son of MUTHU
KARUPPAN ASSARI

(Plaintiff)

vs.

VISALACHI ACHI alias MEENACHI ACHI,
Administratrix of the estate of
M.A.R. ARUMUGAM CHETTIAR

(Defendant).

[IPOH CIVIL SUIT No. 42 of 1940]

Limitation—Express Trustee—distinguished from agent for sale—mere permission to borrow does not end relationship of trustee and cestuique trust.